

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

TROY MITCHELL NAYLOR,

Defendant and Appellant.

C036484

(Super. Ct. No. MH62003)

In 1999, defendant Troy Mitchell Naylor was found to be a sexually violent predator (Welf. & Inst. Code, § 6600, subd. (a))¹ and was committed to the California Department of Mental Health for two years. On April 10, 2000, using forms provided him by the Department of Mental Health advising him of his right to petition the superior court for conditional release (§ 6608) or a "show cause hearing" for a determination whether he was entitled to unconditional release (§ 6605), defendant

¹ Hereafter all statutory references are to the Welfare and Institutions Code unless otherwise specified.

selected the latter.² Defendant also requested appointment of a "qualified expert" to examine his mental condition (§ 6605).

On May 13 the Department of Mental Health prepared a report of defendant's mental condition and forwarded it to the superior court. On June 16, the court notified defendant that a show cause hearing had been calendared for July 17.

On July 11 the court received a request from defendant asking the court to direct the sheriff to transport him to the scheduled hearing. On July 17, after finding defendant's July 11 request to be present at the hearing untimely, and with only the People being present, the court conducted a hearing. The court received in evidence the annual report prepared by the Department of Mental Health, defendant's request for "an order to show cause to determine if his condition has changed," and

² In pertinent part, section 6605 provides: "(b) The director shall provide the [defendant] with an annual written notice of his or her right to petition the court for conditional release under Section 6608. The notice shall contain a waiver of rights. The director shall forward the notice and waiver form to the court with the annual report. If the [defendant] does not affirmatively waive his or her right to petition the court for conditional release the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the [defendant]'s condition has so changed that he or she would not be a danger to the health and safety of others if discharged. The [defendant] shall have the right to be present and to have an attorney represent him or her at the show cause hearing."

Under subdivision (c) of section 6605, if the court finds probable cause to believe the person no longer represents a danger, it must set the matter for trial. Under subdivision (e) of the same section, if the trier of fact finds for the defendant, he must be unconditionally discharged.

an assessment of defendant dated May 13 from the Mental Health Department.

Relying on *People v. Herrera* (1998) 66 Cal.App.4th 1149, which held that the superior court could summarily deny a defendant's petition for a show cause hearing under section 6605 if it determined the petition was frivolous (*Herrera, supra*, at pp. 1152-1153), the court concluded the burden was on defendant to show why the court should issue an order to show cause, and that defendant had "failed to meet even [this] minimal burden." The court then denied defendant's request for an order to show cause.

On appeal, defendant contends reversal is required because the court failed to appoint a qualified expert to conduct the examination he requested, failed to appoint counsel to represent him and be present with him at the hearing, and failed to permit him to cross-examine witnesses. Finding these arguments have merit, we shall reverse.

Following the filing of the briefs in this case, the California Supreme Court filed its opinion in *People v. Cheek* (2001) 25 Cal.4th 894, wherein it expressly disapproved *Herrera's* conclusion that a defendant's request for a show cause hearing under section 6605 could be summarily denied. (*Cheek, supra*, at p. 903.) In *Cheek* the court observed, "Because defendant did not waive his right to seek conditional release to a community treatment program, section 6605, subdivision (b), required the court to conduct a 'show cause hearing' to determine whether to conduct a trial that might lead to

defendant's unconditional release." (*Id.* at p. 899.) The court further observed that the pretrial hearing provided under section 6605 grants the defendant the right to be present and to be represented by an attorney at that hearing as well as the right to present evidence and cross-examine witnesses. (*Cheek, supra*, at p. 900.) Since the superior court failed to afford defendant these rights, it erred in denying his request for a show cause hearing under section 6605, and reversal of the order is required.

DISPOSITION

The order denying defendant's request for a show cause hearing is reversed. The matter is remanded to the superior court for further proceedings in compliance with *People v. Cheek, supra*, 25 Cal.4th 894.

CALLAHAN, J.

We concur:

SCOTLAND, P.J.

MORRISON, J.